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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

LAMAR DAWSON, individually and on behalf of all others similarly situated, Plaintiff, vs. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION and PAC-12 CONFERENCE, Defendants.	Case No. 16-CV-05487-RS **NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** Date: April 21, 2017 Time: 1:30 p.m. Courtroom: Courtroom 3, 17th Floor Before: Hon. Richard Seeborg

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NOTICE OF MOTION AND MOTION

Please take notice that on April 21, 2017 at 1:30 p.m., or as soon thereafter as the matter may be heard by the Court, at the courtroom of the Honorable Richard Seeborg, Courtroom 3, 17th Floor, United States District Court, 450 Golden Gate Avenue, San Francisco, California, Defendants National Collegiate Athletic Association and the Pac-12 Conference, will and hereby do move the Court, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an Order dismissing Plaintiff's entire Complaint, with prejudice.

This motion to dismiss is brought on the basis of this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the complete files and records in this action, and such further and other matter as this Court may, in its discretion, entertain.

DATED: January 27, 2017

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MEMORANDUM OF POINTS AND AUTHORITIES

I.
SUMMARY OF MOTION.

In a recent survey of the case law, commentators concluded that "the courts have been consistent finding that student athletes are not recognized as employees under any legal standard," including "under … the FLSA." Adam Epstein & Paul M. Anderson, *The Relationship Between a Collegiate Student-Athlete and the University: An Historical and Legal Perspective*, 26 MARQ. SPORTS L. REV. 287, 297 (2016).

In December 2016, the Seventh Circuit reached the same conclusion, holding that Division I athletes are not "employees" under the FLSA as a matter of law. *Berger v. National Collegiate Athletic Association*, et al., 843 F.3d 285 (7th Cir. 2016). The Seventh Circuit subsequently refused to rehear the case *en banc*. *Id.*, Case No. 16-1558, Dkt. # 56.

Against this backdrop, Plaintiff Lamar Dawson contends—under both the FLSA and California law—that he, and all other NCAA Division I college football players in the country, are employees of the NCAA (a national membership organization of schools that sponsor athletic programs), and the Pac-12 (an athletic conference), and should be paid for the hours they voluntarily commit to football.

Mr. Dawson asserts the following claims against the NCAA and Pac-12: (1) unpaid wages, including minimum wages and overtime, under the FLSA on behalf of a nationwide class of all student-athletes in a NCAA Division I FBS football programs ("the FLSA Class") (Compl., ¶¶ 26, 82, 94); (2) minimum wages, overtime, itemized wage statements, and related penalties under the California Labor Code on behalf of all student-athletes who played Division I FBS football in California as part of the Pac-12 Conference (the "California Class") (Compl., ¶¶ 27, 87, 100, 112, 116, 122); and (3) derivative claims under California's Labor Code Private Attorneys General Act and Unfair Competition Law. (Compl. ¶¶ 134, 142.)

Dawson's FLSA claims fail as a matter of law. The Ninth Circuit follows the same "economic reality" approach that led the *Berger* court to conclude that Division I student-athletes "as a matter of law … are not employees." There is no reason for this Court to depart from the well-reasoned conclusion of the *Berger* court (and of every other court to have considered the alleged employment status of student-athletes).

Dawson's California law claims fare no better. The California Legislature, by excluding student-athletes from worker's compensation coverage, has already decided that student-athletes are not employees. Based on the Legislature's declaration of public policy, the California courts have also held that student-athletes do not receive the protection of state discrimination laws, and cannot be deemed "employees" for purposes of the state's Tort Claims Act as a matter of law. It would be ***directly*** contrary to this legislative intent if student-athletes were considered "employees" under California's wage-hour laws, but expressly *ineligible* for other workplace protections. In fact, there is not a single California case that has held that student-athletes are employees of the colleges and universities they attend in any context.

Dawson tries to do an end run around well settled federal and state law foreclosing employment claims against colleges and universities, suing, instead, an athletic conference (the Pac-12), and a national membership organization (the NCAA). This Court should block Dawson's misplaced efforts. Given that, as a matter of federal and state law, a student-athlete is not an employee of his or her school, an athletic conference and a national membership organization that have literally no day-to-day interaction with the student-athletes attending their member institutions cannot possibly be an employer.

This Court should accordingly dismiss Mr. Dawson's complaint with prejudice.

II.
STUDENT-ATHLETES ARE NOT "EMPLOYEES" UNDER THE FLSA.

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the claims alleged in the complaint. *See Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). Dismissal under Rule 12(b)(6) may be based on, *inter alia*, the "lack of a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

In *Berger*, the Seventh Circuit affirmed dismissal under Rule 12 of essentially the same FLSA claim that Dawson asserts here. As the Seventh and Ninth Circuits apply the same "economic reality" standard for deciding "employee" status, this Court should apply *Berger* and dismiss Dawson's federal claims.

A. APPLYING STANDARDS ALSO USED IN THE NINTH CIRCUIT, *BERGER* HOLDS THAT STUDENT-ATHLETES ARE NOT EMPLOYEES AS A MATTER OF LAW.

In *Berger*, two former University of Pennsylvania track-and-field athletes sued their *alma mater*, over 120 NCAA Division I schools, and the NCAA, alleging, like Dawson, "that student athletes are employees who are entitled to a minimum wage under the" FLSA. 843 F.3d at 288. The Southern District of Indiana dismissed their complaint with prejudice under Rule 12, "holding that (1) [plaintiffs] lacked standing to sue any of the [defendants] other than Penn, and (2) [plaintiffs] failed to state a claim against Penn because student athletes are not employees under the FLSA." *Id.* at 289. The Seventh Circuit affirmed both conclusions.

Berger first held that the NCAA should be dismissed because the "connection" between student athletes "and the NCAA is ***far too tenuous to be considered an employment relationship*** . . ." 843 F.3d at 289 (emphasis added). It relied on two propositions: first, Article III standing requires that a plaintiff establish he or she has suffered an "injury . . . fairly traceable to the challenged action of the defendant." *Id.* (*quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 [2000)]). Second, "[u]nder the FLSA, alleged employees' 'injuries are only traceable to, and redressable by, those who employed them.'" *Id.* (*quoting Roman v. Guapos III, Inc.*, 970 F.Supp.2d 407, 412 [D. Md. 2013]).

Based on these incontrovertible propositions, the Seventh Circuit held that the plaintiff student-athletes had Article III standing to allege FLSA claims *only* against their own university. Because the plaintiffs' "connection to the other schools and the NCAA is far too tenuous to be considered an employment relationship," the court dismissed the NCAA and the other schools. The Seventh Circuit then turned to the athletes' relationship to Penn itself. The court broadly held that "student athletes are not employees" of the schools they attend "and are not covered by the FLSA" as a matter of law. 843 F.3d at 288.

Berger started with the observation that the text of the FLSA defines the employment relationship in a "circular fashion." *Id.* at 290. An "employee" is "any individual employed by an employer." 29 U.S.C. § 203(e)(1). An "employer" is "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). "Employ" is defined as "to suffer or permit to work." 29 U.S.C. § 203(g). "Work" is not defined at all. *Berger*, 843 F.3d at 290.

Berger thus turned to a well-established FLSA principle to resolve the issue: "Because status as an 'employee' for purposes of the FLSA depends on the totality of circumstances rather than on any technical label, courts must examine the *'economic reality'* of the working relationship … to decide whether Congress intended the FLSA to apply to that particular relationship." *Id.* (*quoting Vanskike v. Peters*, 974 F.2d 806, 809 [7th Cir. 1992] [emphasis added].)

1. LIKE THE NINTH CIRCUIT, *BERGER* HOLDS THAT THE "ECONOMIC REALITY" INQUIRY DOES NOT REQUIRE USE OF A MULTI-FACTOR TEST.

The "economic reality" standard articulated in *Berger* was first established by the U.S. Supreme Court in *Goldberg v. Whitaker House Coop.*, 366 U.S. 28, 33, 81 S.Ct. 933, 936, 6 L.Ed.2d 100 (1961). It has also been adopted by the Ninth Circuit. *Hale v. Arizona*, 993 F.2d 1387, 1394 (9th Cir.) (*en banc*), *cert. den.*, 114 S.Ct. 386 (1993) ("as a general rule, whether there is an employment relationship under the FLSA is tested by 'economic reality' rather than 'technical concepts.'").

To guide the "economic reality" inquiry, *Berger* observed that courts have established various "multifactor tests" to determine whether a particular relationship qualifies as "employment" under the FLSA. *Berger*, 843 F.3d at 290.[1] However, *Berger* also makes clear that courts should

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[1] As *Berger* summarized, these multi-factor tests include a seven-factor test used by the Seventh Circuit to determine whether migrant laborers were employees under the FLSA, (*Sec'y of Labor v. Lauritzen*, 835 F.2d 1529 [7th Cir. 1987]), another seven-factor test formulated by the

"decline[] to apply multifactor tests in the employment setting when they 'fail to capture the true nature of the relationship' between the alleged employee and the alleged employer.'" *Id.* at 290-91 (*quoting Vanskike*, 974 F.2d at 809).

The Ninth Circuit is in accord, even noting in *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983), that the four-factor test crafted in that case to determine joint employer status was "*not etched in stone and will not be blindly applied*," and that the "ultimate determination must be based 'upon the circumstances of the whole activity.'" *Id.* 1470 (emphasis added).

Berger then discussed various cases in which it was determined that a global approach to the "economic reality" test was more appropriate than adhering formulaically to a particular multi-factor test. In *Vanskike*, for example, the Seventh Circuit declined to apply the multi-factor test from *Bonnette*, 704 F.2d 1465, in deciding whether prisoners performing work assignments were employees under the FLSA. The *Bonnette* factors, "with their emphasis on control over the terms and structure of the employment," is "not the most helpful guide in the situation presented here" because "[t]he dispute in this case is a more fundamental one: Can this prisoner plausibly be said to be 'employed' in the relevant sense at all?" *Vanskike*, 974 F.2d at 808-09, quoted in *Berger*, 843 F.3d at 290.

The *Vanskike* court thus decided, based on the fundamental "economic reality" of the relationship, that the prisoners were not employees of the prison. *Id.* *See also Berger*, 843 F.3d at 290, n.3 (collecting other cases where multi-factor tests were rejected in favor of an overarching "economic realities" approach).

Contrary to Dawson's position,[2] the Ninth Circuit—like the Seventh—disregards the *Bonnette* factors if they do not capture the "economic reality" of the relationship. In *Hale*, for example, the Ninth Circuit agreed with *Vanskike* that "[r]egardless of how the *Bonnette* factors

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Second Circuit to determine whether an intern is an employee (*Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528 [2nd Cir. 2015]), and a four-factor test established by the Ninth Circuit to determine whether a state agency was a joint employer under the FLSA (*Bonnette*, 704 F.2d 1465[]). *Berger*, 843 F.3d at 290 & n.2.

[2] *See* Dkt. #32, Dawson's Opposition to Administrative Motion to Enlarge Time, pp. 4-5.

balance, … they are not a useful framework in the case of prisoners who work for a prison-structured program because they have to." *Hale*, 993 F.2d at 1394.[3]

Echoing *Vanskike*, the Ninth Circuit held that the multi-factor test is appropriate when "it is clear that some entity is an 'employer' and the question is which one," rather than when the dispute is fundamentally about whether a person can "plausibly be said to be 'employed' in the relevant sense at all?" *Id.* It thus concluded that the prisoners were not employees.

Berger took the same approach as *Hale* and *Vanskike*, declining to apply a multi-factor test because it "fail[ed] to capture the true nature of the relationship' between student athletes and their schools and is not a 'helpful guide.'" *Id.* *Berger* instead focused on the fundamental "economic reality" of the relationship between the student athlete and his or her university. 843 F.3d at 291. In this regard, *Berger* first noted that there "exists a 'revered tradition of amateurism in college sports.'" *Id.* (*quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okl*a., 468 U.S. 85, 120, 468 U.S. 85, 119, 104 S.Ct. 2948, 2970 [1984].) "That long-standing tradition," rather than a multi-factor test, "defines the economic reality of the relationship between student athletes and their schools." *Id.*

Citing the Ninth Circuit's decision in *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1054–55 (9th Cir. 2015), *Berger* noted that "the NCAA and its member universities and colleges have created an elaborate system of eligibility rules" in order to "maintain this tradition of amateurism." 843 F.3d at 291. These rules, *Berger* held, "'define what it means to be an amateur or a student-athlete, and are therefore essential to the very existence of" collegiate athletics." *Id.* (*quoting Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 343 [7th Cir. 2012].)

"The multifactor test proposed by [plaintiffs] simply does not take into account this tradition of amateurism or the reality of the student athlete experience." *Id.*

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[3] *Hale* was issued after rehearing *en banc*. The original panel decision applied the *Bonnette* factors to find that the prisoners on work assignment were employees under the FLSA. *Hale v. Arizona*, 967 F.2d 1356, 1368-69 (9th Cir. 1992) (original panel opinion). Upon *en banc* review, the Ninth Circuit reversed, concurred with *Vanskike*, and declined to apply the *Bonnette* factors. *Hale*, 993 F.2d at 1394.

Rather than straining to fit the case into a multi-factor test, *Berger* proceeded to evaluate the fundamental "economic reality" of the relationship between the student athlete and the school, turning first to the extensive past experience of courts and of regulators.

2. *BERGER* EMPHASIZES THAT OTHER COURTS AND THE DOL HAVE CONSISTENTLY FOUND THAT STUDENT-ATHLETES ARE NOT EMPLOYEES.

"A majority of courts," *Berger* noted, "have concluded—albeit in different contexts—that student athletes are not employees." 843 F.3d at 291. Among those cases are:

- *Kavanagh v. Trustees of Boston Univ*., 440 Mass. 195, 198, 795 N.E.2d 1170, 1175 (2003): "a scholarship or other financial assistance does not transform the relationship between the academic institution and the student into any form of employment relationship";
- *Korellas v. Ohio State Univ*., 121 Ohio Misc. 2d 16, 18, 779 N.E.2d 1112, 1114 (Ohio Ct. Cl. 2002): football student-athlete was not an employee of Ohio State University;
- *State Comp. Ins. Fund v. Industrial Commission*, 135 Colo. 570, 573-74, 314 P.2d 288, 290 (1957): rejecting workers' compensation claim on the ground that student-athlete was not an employee);
- *Waldrep v. Texas Employers Ins. Ass'n*, 21 S.W.3d 692, 701 (Tex. App. 2000): rejecting argument that football student-athlete was an employee of his school);
- *Rensing v. Indiana State Univ. Bd. of Trustees*, 444 N.E.2d 1170, 1175 (Ind. 1983): "the appellant shall be considered only as a student athlete and not as an employee within the meaning of the Workmen's Compensation Act";
- *Coleman v. Western Michigan University*, 125 Mich. App. 35, 44, 336 N.W.2d 224, 228 (1983): "[W]e conclude that the WCAB did not err in finding that our plaintiff was not an 'employee' of defendant within the meaning of the act."[4]

As discussed in greater detail in Section III, *infra*, California is part of that majority. Indeed, the only state decisions which disagreed with the majority view were distinguishable because "the student athletes in those cases were also *separately employed* by their universities." *Berger*, 843 F.3d at 292 (emphasis added). There is no allegation of separate or dual employment here. Furthermore, one of those cases, *Van Horn v. Indus. Accident Comm'n*, 219 Cal.App.2d 457 (1963), was disapproved of by the California legislature, which responded by "explicitly exclud[ing] student-athletic participants as employees for purposes of workers' compensation." *Berger*, 843 F.3d at 292. Finally, the two cases are further distinguished from this case because the claims in those cases were brought by student athletes against the universities, not against the athletic conferences or the NCAA.

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[4] *See also* Ohio Rev. Code §3345.56 ("a student attending a state university … is not an employee of the state university based on the student's participation in an athletic program offered by the state university"); Mich. Comp. Laws Ann. § 423.201(1)(e)(iii) ("a student participating in intercollegiate athletics on behalf of a public university in this state … is not a public employee entitled to representation or collective bargaining rights").

On the regulatory front, *Berger* noted, "[t]he Department of Labor . . . has also indicated that student athletes are not employees under the FLSA." *Berger*, 843 F.3d at 292. It is well settled that "agency manuals, and enforcement guidelines" are "'entitled to respect'" under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944) "to the extent that those interpretations have the 'power to persuade…'" *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1655, 1662–63, 146 L.Ed.2d 621 (2000).

In its *Field Operations Handbook* ("*FOH*"),[5] the Department opines that "University or college students who participate in activities generally recognized as ***extracurricular*** are generally not considered to be employees within the meaning of the [FLSA]." *FOH*, § 10b24(a) (emphasis added). Furthermore:

> "As part of their overall educational program, public or private schools . . . may permit or require students to engage in activities in connection with dramatics, student publications, glee clubs, bands, choirs, debating teams, radio stations, intramural and ***interscholastic athletics*** and other similar endeavors. Activities of students in such programs, conducted primarily for the benefit of the participants as a part of the educational opportunities provided to the students by the school or institution, are not work of the kind contemplated by [the FLSA] and do not result in an employer-employee relationship between the student and the school. . . ." *FOH*, § 10b03(e) (emphasis added).

While "the provisions in this handbook are not dispositive," *Berger* held, "they certainly are persuasive." 843 F.3d at 292; *see also id.* at 293 ("[w]e find the FOH's interpretation of the student-athlete experience to be persuasive.") The court thus concluded that, "[b]ecause NCAA-regulated sports are 'extracurricular,' 'interscholastic athletic' activities, we do not believe that the Department of Labor intended the FLSA to apply to student athletes." *Id.* at 293.

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[5] Available on the Internet at https://www.dol.gov/Whd/FOH/index.htm.

3. *BERGER* DEFINITIVELY HOLDS, BASED ON THE "ECONOMIC REALITY" OF THE RELATIONSHIP, THAT STUDENT-ATHLETES ARE NOT EMPLOYEES OF THEIR SCHOOLS AS A MATTER OF LAW.

The Seventh Circuit synthesized its "economic reality" analysis by stating definitively that students athletes cannot be employees *as a matter of law* because their participation in sports is voluntary, there is a long tradition of amateurism in college sports, and student athletes have participated in sports for over a hundred years without any expectation of pay:

> "Appellants in this case have not, and quite frankly cannot, allege that the activities they pursued as student athletes qualify as 'work' sufficient to trigger the minimum wage requirements of the FLSA. Student participation in collegiate athletics is entirely voluntary. Moreover, the long tradition of amateurism in college sports, by definition, shows that student athletes—like all amateur athletes—participate in their sports for reasons wholly unrelated to immediate compensation.
>
> "Although we do not doubt that student athletes spend a tremendous amount of time playing for their respective schools, they do so—and have done so for over a hundred years under the NCAA—without any real expectation of earning an income. Simply put, student-athletic 'play' is not 'work,' at least as the term is used in the FLSA.
>
> "***We therefore hold, as a matter of law, that student athletes are not employees and are not entitled to a minimum wage under the FLSA***." *Id.* at 293 (emphasis added).

Finally, the Seventh Circuit emphasized the appropriateness of resolving the *Berger* case at the motion to dismiss stage:

> "We briefly conclude by addressing Appellants' argument that employment status is an inherently fact-intensive inquiry and thus should not be decided at the motion-to-dismiss stage. We reject this argument. Because we conclude, as a matter of law, that student athletes are not employees under the FLSA, no discovery or further development of the record could help Appellants. Appellants did not and could not allege facts, even taken as true, that give rise to a cause of action." *Id.* at 293.

B. THIS COURT SHOULD REACH THE SAME RESULT AS *BERGER*.

As explained above, the principles of law that apply in the Ninth Circuit, particularly as they relate to the "economic reality" inquiry, are identical to those that applied in *Berger*. *See* Section II(A)(1), *supra*. Thus, as in *Berger*, this Court should conclude (1) that the relationship between Dawson, on the one hand, and the NCAA and Pac-12 is "far too tenuous to be considered an employment relationship," and (2) that, based on the "economic reality" of the relationship between student-athletes and their colleges, Dawson is not an "employee" under the FLSA as a matter of law.

The *Berger* concurrence should not lead this Court to a different result. Judge Edith Hamilton opined that she was "less confident" that *Berger*'s reasoning should extend to "students who receive athletic scholarships to participate in so-called revenue sports…" 843 F.3d at 294. However, she cited no case authority to support that these two factors—"athletic scholarships" and "revenue sports"—are legally relevant. If anything, receipt of a college scholarship supports the educational nature of the relationship. *Kavanagh*, 795 N.E.2d at 1175 (2003) ("a scholarship does not transform the relationship between the academic institution and the student into any form of employment relationship").

Further, to base "employee" status on whether a sport is "revenue" or "non-revenue" (or something in between, depending on a sport's profitability from year to year) is arbitrary, has no legal foundation and would create significant practical challenges and inconsistent applications. For example, under this theory:

- Whether a student-athlete is considered an employee would turn on the happenstance of which school he attended. A football player at U.S.C. might be an employee, while a football player at Cal. State Fullerton might not.
- Even within the same school, a football player could be an employee in one year and not an employee in the next because the football program operated at a profit in the first year and a deficit in the second.
- If the focus is "revenue," a football player might be an employee, while a wrestler (or golfer, or sprinter, *etc.*) at the same school might not. That would be so even if all of those athletes devoted as much time and effort to perfecting their respective sports as the football player. And even if the "non-revenue" player was a national champion who brought great acclaim to the school, and the football player was a third-string player who only played during practice.
- The rule that Judge Hamilton describes is fraught with problematic implications, because women's sports are almost exclusively "non-revenue." Under Judge Hamilton's analysis,

a male basketball player at Stanford University might be an employee under the FLSA because men's basketball is a "revenue" sport, while a female basketball player at the same school might not be. Needless to say, such gender-based differentiation could raise a number of potential legal issues.

None of these issues is addressed in even the most cursory fashion in Judge Hamilton's two-paragraph, single-page concurrence. The Court should decline to follow this *dicta*.

III.
STUDENT-ATHLETES ARE NOT "EMPLOYEES" UNDER CALIFORNIA LAW.

After the Legislature spoke on the issue, the California courts have unanimously held that student-athletes are not "employees" for purposes of applying state workplace protections of any kind, including anti-discrimination laws, workers compensation laws, and under California's Tort Claims Act. Dismissal under Rule 12 is, accordingly, required. *See, e.g., Woodson v. State of California*, No. 2:15-cv-01206-MCE-CKD, 2016 WL 6568668, at *5 (E.D. Cal. Nov. 4, 2016) (granting motion to dismiss Fair Employment and Housing Act ["FEHA"] claim with prejudice because plaintiff not an employee under FEHA as a matter of law).

In *Shephard v. Loyola Marymount Univ.*, 102 Cal.App.4th 837, 125 Cal.Rptr.2d 829, 833–35 (2002), the California Court of Appeal put the point as bluntly as possible: "[T]he application of traditional statutory construction principles warrants the conclusion that ***a student athlete is not a school employee***" for purposes of applying workplace discrimination laws. *Id.* at 844–46, 125 Cal.Rptr.2d at 833–35.

Shephard is the latest of a line of cases following the Legislative rejection of the proposition that student-athletes are employees of the schools they attend.

The Legislature's student-athlete exclusion. In *Van Horn v. Industrial Acc. Comm.*, 219 Cal.App.2d 457 (1963), the court awarded workers' compensation benefits to the heirs of a deceased student-athlete on the theory that his agreement to play football was a contract with his school to "render[] services" to his school by playing football in exchange for financial aid. *Id.* at 456. The California Legislature immediately adopted Cal. Lab. Code § 3352(k) to reverse *Van Horn*. *See*

Shephard, 102 Cal.App.4th at 843-44, 125 Cal.Rptr.2d at 832–33 (discussing *Van Horn*). The Legislature declared that:

> "'Employee' excludes the following: … [a]ny student participating as an athlete in amateur sporting events sponsored by any public agency, public or private nonprofit college, university or school, who receives no remuneration for the participation other than the use of athletic equipment, uniforms, transportation, travel, meals, lodgings, scholarships, grants-in-aid, or other expenses incidental thereto." Cal. Labor Code § 3352(k).

See also Graczyk v. Workers' Comp. Appeals Bd., 184 Cal.App.3d 997, 1005, 229 Cal.Rptr. 494, 499 (1986) (holding that the 1965 amendments creating § 3352(k) clarified that student-athletes fell outside the definition of "employee" for workers' compensation purposes, and noting that "the state has a significant, if not a compelling interest in defining the employer-employee status….")[6]

Since Section 3352(k) was enacted, courts have relied on it to extend ***beyond*** the workers' compensation context the principle that student-athletes were not employees of their schools. *See Shephard*, 102 Cal.App.4th at 844-45, 833-34.

***Townsend*—exclusion extended to tort claims.** In *Townsend v. State of California*, 191 Cal.App.3d 1530, 1537, 237 Cal.Rptr. 146, 150 (1987), the California Court of Appeals held that "as a matter of law" a student-athlete "was not an employee" of his university for purposes of the Tort Claims Act, Cal. Gov't Code § 810.

The plaintiff in *Townsend* made an argument similar to the one Dawson makes here: that "since intercollegiate athletics are 'big business' and generate large revenues for the institutions who field teams in such competition, the athletes who represent those institutions should be considered to be employees or agents of those institutions under the doctrine of *respondeat superior*." *Townsend*, 191 Cal.App.3d at 1532, 237 Cal.Rptr. at 146.

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[6] In 1986, the California Legislature further underscored the amateur status of student-athletes, enacting provisions in the Education Code that, with limited exceptions, prohibit any person from giving "money or other thing of value" to a student-athlete to induce the athlete's participation in athletic programs at postsecondary educational institutions. *See* Cal. Edu. Code §§ 67360-67361, 67365.

The California Court of Appeal rejected this argument, first observing that "statutory law is a primary source of public policy declarations, and one of the most significant modern adjuncts of the employer-employee relationship is the workers compensation scheme." *Id.* Hence, it reasoned, the "Legislature's definition of 'employee' in [the workers' compensation context] is of great significance in analyzing" whether a student-athlete could be deemed an employee for the purposes of attributing liability for personal injury under the doctrine of *respondeat superior*."

The court thus concluded that it had "no doubt" that Section 3352(k) "evidenced an intent on the part of the Legislature to prevent the student-athlete from being considered an employee of an educational institution *for any purpose* . . . ." *Id.* at 1535, 237 Cal.Rptr. at 149.

Shephard further explains why *Townsend* reached this conclusion: The California Supreme Court has long held that "[s]tatutes relating to the same subject matter must be harmonized insofar as is possible," (*Shephard*, 102 Cal.App.4th at 845-46, 125 Cal.Rptr.2d at 835 (*quoting Chevron U.S.A., Inc. v. Worker's Comp. Appeals Bd.*, 19 Cal.4th 1182, 1195, 81 Cal.Rptr.2d 521, 527 [1999]) and that "when words used in a statute have acquired a settled meaning through judicial interpretation, the words should be given the same meaning when used in another statute dealing with analogous subject matter … [especially where] both statutes were enacted for the welfare of employees and are in harmony with each other." *Shephard*, 102 Cal.App.4th at 846, 125 Cal.Rptr.2d at 835 (*quoting Torres v. Parkhouse Tire Service, Inc.*, 26 Cal.4th 483, 496 n.16, 66 Cal.Rptr.2d 304, 312 n.16 [2001].)

***Shephard*—exclusion extended to FEHA claims.** The issue in *Shephard* was whether or not a student-athlete was an employee for the purposes of FEHA's antidiscrimination protections. *Shephard*, 102 Cal.App.4th at 842, 125 Cal.Rptr.2d at 832. Noting that FEHA "provides limited definitions of the terms 'employee' and 'employer,'" *Shephard* looked to the California Labor Code's treatment of student-athletes in other contexts, as well as case law interpreting those statutes. *Id.* at 842-43, 832-33. Like *Townsend* before it, *Shepherd* held that Section 3352(k) reflected a broad-based legislative policy to protect schools from collateral "financial liability" for maintaining athletic programs. It cited (and quoted) *Townsend*, which explained that:

> "From the standpoint of public policy consideration, exposing those institutions to vicarious liability for torts committed in athletic competition would create a severe financial drain on the State's precious educational resources. We have no doubt that this was one of the considerations which led to the amendment of Labor Code section 3352 and that *that amendment evidenced an intent on the part of the Legislature to prevent the student-athlete from being considered an employee of an educational institution* ***for any purpose*** *which could result in financial liability on the part of the university*." *Townsend*, 191 Cal.App.3d at 1537, 237 Cal.Rptr. at 149-50 (emphasis added) (*quoted with approval in Shephard*, 102 Cal.App.4th at 843, 125 Cal.Rptr.2d at 833).[7]

Accordingly, *Shepard* concluded, "[n]o reason exists to distinguish the reasoning of *Graczyzk* and *Townsend* from the facts of this case." *Shephard*, 102 Cal.App.4th at 845, 125 Cal.Rptr.2d at 834.

The Court should apply the exclusion here. As coverage of California employment standards is a question of state law, "in the absence of convincing evidence that the highest court of the state would decide differently,'" this Court "is obligated to follow the decisions of the state's intermediate courts." *In re Kirkland*, 915 F.2d 1236, 1239 (9th Cir. 1990) (*quoting Stoner v. New York Life Ins. Co.*, 311 U.S. 464, 61 S.Ct. 336, 85 L.Ed. 284 [1940]). Since the California appellate courts have unanimously held that student-athletes are not employees—and the California Supreme Court has never granted review to disturb this holding[8]—this Court is obliged to follow this uniform body of case law and to dismiss Dawson's California claims.

The California wage and hour statutes at issue in Dawson's Complaint apply only to "employees." *See e.g.* Cal. Labor Code §§ 226, 510, 558, 1194, 1198; *Taylor v. Waddell & Reed*

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[7] *Townsend*'s public policy concerns are well-taken. The current model has been in place, uninterrupted, since the NCAA was founded in 1906. There are approximately 1,100 schools that participate in the NCAA, 253 of which have Division 1 football programs. (Compl., ¶ 20.) Transforming student-athletes in such programs into employees is fundamentally at odds with the notion of collegiate sports. Further, imposing wage-and-hour liability and requiring payment of wages also could jeopardize the long-term sustainability of college sports, and potentially take away opportunities for thousands of prospective student-athletes. *See, e.g.*, Michael P. Cianfichi, *Varsity Blues: Student Athlete Unionization Is the Wrong Way Forward to Reform Collegiate Athletics*, 74 MD. L. REV. 583, 606 (2015) ("An attempt to make all student athletes employees could lead to the financial collapse of collegiate athletics.")

[8] In fact, the California Supreme Court has cited *Townsend* with approval. *Avila v. Citrus Cmty. Coll. Dist.*, 38 Cal.4th 148, 167, 41 Cal.Rptr.3d 299, 314 (2006) ("Universities ordinarily are not vicariously liable for the actions of their student-athletes during competition").

Inc., 2010 WL 3212136, at *2 (S.D. Cal. Aug. 12, 2010) ("Wage and hour laws apply to employees"). Under *Shepard*, 102 Cal.App.4th at 846, these wage and hour statutes "should be construed together in a harmonious fashion" with Labor Code § 3352(k), the Tort Claims Act, and the FEHA.

Further, excluding student-athletes from the coverage of wage and hour laws lies even closer to the heart of this policy than does excluding them from antidiscrimination laws. After all, without such an exclusion, merely *having* sports teams might "result in financial liability," while liability is incurred under FEHA only if a school engages in discriminatory conduct.

This Court should follow the unanimous voices of California's Legislature and its Court of Appeal to dismiss Plaintiff's California claims. That result should not change simply because Dawson has chosen to sue the NCAA and Pac-12 instead of his school. In fact, the legal analysis and public policy concerns discussed above apply with even greater force here because the NCAA and Pac-12 are even farther removed from his participation in football than his university.

IV.
PLAINTIFF'S DERIVATIVE CALIFORNIA LAW CLAIMS SHOULD BE DISMISSED.

Finally, because Dawson's primary Labor Code claims must be dismissed, his Ninth and Tenth Causes of Action, brought under California's Labor Code Private Attorney General Act ("PAGA") and its Unfair Competition Law ("UCL"), must also be dismissed.

PAGA claims that are predicated on causes of action under the Labor Code which fail to state a claim must also be dismissed. *Tan v. GrubHub, Inc.*, — F. Supp. 3d —, 2016 WL 1110236, at * 7 (N.D. Cal. Mar. 22, 2016); *see also Wentz v. Taco Bell Corp.*, No. CV F 12-1813 LJO DLB, 2012 WL 6021367, at *5 (E.D. Cal. Dec. 4, 2012) (dismissing PAGA claims where predicate Labor Code claims were remanded to state court).

With respect to the UCL claim, Dawson alleges that Defendants committed "unfair, unlawful and fraudulent" business practices resulting in the variety of wage-and-hour violations articulated in the Complaint. (Compl. ¶¶ 140-142.) "Where the UCL claim is premised on the same acts alleged in the complaint's other causes of action, and those causes of action fail, the UCL claim likewise must be dismissed because the plaintiff has not adequately alleged any predicate unlawful acts." *Tan*, 2016 WL 1110236, at * 7 (dismissing UCL claims premised on Labor Code violations dismissed on a Rule 12(b)(6) motion) (internal citations omitted); *see also, e.g., Sciortino v. Pepsico, Inc.*, 108 F.Supp.3d 780, 790 (N.D. Cal. 2015) (explaining that a plaintiff cannot "plead around" a statutory barrier to suit by characterizing their claim as a UCL claim) (citations omitted); *Lomely v. JP Morgan Chase Bank, N.A.*, No. 12–CV–1194, 2012 WL 4123403, at *5 (N.D. Cal. Sept. 17, 2012) (dismissing UCL claims premised on the foreclosure violation claims arising under the California Civil Code that were also dismissed at the motion to dismiss stage).

V.
CONCLUSION.

For the reasons set forth above, Defendants respectfully request that this Court grant the Motion to Dismiss with prejudice.

DATED: January 27, 2017 CONSTANGY, BROOKS, SMITH & PROPHETE, LLP

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